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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. ...336

PERCE HENDERSON, HERBERT L. HALL, JR., NEAL NOLAN, REDNOR AND KLINE, INC., AND THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF MORRISVILLE, PENNSYLVANIA, Petitioners,

v.

THE DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, AND THE CITY OF EASTON, PENNSYLVANIA, Respondents.

BRIEF OF THE DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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ARGUMENT.

The petition for certiorari submits three questions presented, which will be considered in order.

PETITIONERS' FIRST QUESTION.

"1. Whether the Delaware River Joint Toll Bridge Commission, hereinafter called the Commission, was authorized under the provisions of Article X, Section (d), as amended, Pennsylvania Act of June 13, 1947, P. L. 592, No. 256, § 1, 36 P. S. 3401; N. J. L., 1947, c. 283, p. 989, and as ratified by the Congress of the United States, Act of Aug. 4, 1947, c. 481, 61 Stat. 756, to over-

pass the streets of the Borough of Morrisville without the consent of the governing body thereof?"

This question overlooks the fact that the General Assembly of Pennsylvania, by the Act of March 31, 1949, known as Act No. 35, expressly conferred additional and ancillary authority upon the Commission to condemn property of a municipality and without securing the consent of such municipality.

The answer to respondent's question is that Article III of the Original Compact provided that the property of a municipality might be taken by the Commission provided that the Commission was expressly authorized so to do by the State; and Act No. 35 confers such express authority.

Furthermore, the answer to this question depends wholly upon the interpretation of the language of these particular compacts, which are clearly expressed and involve no question of general importance.

The contention of plaintiffs is that this provision in Act No. 35 is invalid unless consent thereto is given by Congress and also by the State of New Jersey.

This position, we submit, is untenable, because—

(a) THE ORIGINAL COMPACT EXPRESSLY AUTHORIZED THE COMMISSION TO ACQUIRE ANY PROPERTY IN PENNSYLVANIA AND NEW JERSEY BY THE EXERCISE OF EMINENT DOMAIN.

Article III provides:

> "If for any of its authorized purposes (including temporary purposes), the commission shall find it necessary or convenient to acquire for public use

any real property in the Commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest, and the said determination shall not be affected by the fact that such property has theretofore been taken for or is then devoted to public use * * *" (Emphasis ours)

The condemnation of property owned by any city or borough is expressly provided for in the following passage:

"However, anything to the contrary contained in this compact notwithstanding, no property, now or hereafter vested in or held by any county, city, borough, village, township or other municipality shall be taken by the commission without the consent of such municipality, unless expressly authorized to do so by the Commonwealth or State in which such municipality is located. * * *" (Emphasis ours)

Express authority to condemn such property is conferred upon the Commission by Act No. 35.

Section 1 of Act No. 35 provides:

"Section 1. For the effectuation of its authorized purposes the Delaware Joint Toll Bridge Commission a body corporate and politic (hereinafter referred to as the 'Commission') is hereby granted power and authority to enter upon, use, overpass, occupy, enlarge, construct, improve or close any easement, street, road or highway located within the limits of any municipality in Pennsylvania or to use,

occupy or take property now or hereafter vested in or held by any municipality in Pennsylvania." (Emphasis ours)

Section 2 makes it clear that the consent of the municipality to such condemnation is not necessary.

Section 2 provides:

"* * * It shall not be necessary for the Commission to obtain the consent of the municipality or the governing body thereof for the exercise of any of the powers conferred by this act any law or compact to the contrary notwithstanding." (Emphasis ours)

The property which the Commission may condemn is broadly defined in the last paragraph of Article III of the Original Compact, as follows:

"The term 'real property,' as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate." (Emphasis ours)

We conclude, therefore, that authority to condemn streets or any other real property of a municipality has been conferred upon the Commission by express lan-

guage and in entire accord with the provisions of the Original Compact.

(b) THE SUPPLEMENTAL COMPACT DOES NOT TAKE AWAY OR LIMIT THE POWER OF THE COMMISSION TO ACQUIRE STREETS OR OTHER MUNICIPAL PROPERTY BY THE EXERCISE OF THE POWER OF EMINENT DOMAIN.

Section 4 of the Supplemental Compact expressly provides:

> "**Nothing contained in this act,** nor in the supplemental compact or agreement authorized by this act, **shall be deemed to supersede, abrogate or repeal in any way, any powers heretofore granted to the commission.** This act, and said supplemental compact or agreement, shall be **regarded as conferring supplemental and additional powers to the commission,** and shall not be **regarded as being in derogation of any power now existing.**" (Emphasis ours)

It follows, therefore, that—

(a) The Original Compact permits the Commission to acquire streets by eminent domain if authorized so to do by the Commonwealth of Pennsylvania and the Commonwealth has so authorized by Act No. 35.

(b) The Supplemental Compact does not supersede, abrogate or repeal, in any way this, or any other power granted to the Commission.

Section (d) of Article X of the Supplemental Compact provides:

> "(d) The commission may enter upon use, occupy, enlarge, construct and improve, any street, road or highway, located within the limits of any municipality, and deemed by the commission to be necessary in connection with the acquisition, con-

struction, improvement, maintenance or operation, of any bridge, owned or operated by the commission, or of any bridge approaches, bridge plazas, or approach highways to any such bridge, subject however to the consent of the governing body of such municipality, and to such reasonable police regulations as may be established by such governing body."

This language authorizes a permissive occupation as distinguished from acquisition by the right of eminent domain under Article III of the Original Compact.

The Legislature did not intend by Section (d) of Article X of the Supplemental Compact to abrogate or take away the broad power of eminent domain contained in Article III of the Original Compact, for in so doing it would have made it possible for the members of the council of any borough or other political subdivision to veto or thwart an improvement of great public importance by refusing its consent to the occupation. This would have defeated the very purpose which was sought to be accomplished by the provision of Article III of the Original Compact that the Commission might take the property of a municipality without its consent, if expressly authorized to do by the Commonwealth of Pennsylvania, which authority has been given by Act No. 35.

The Original Compact and the supplement provide that the Commission may obtain the right to occupy streets by either one of two separate and independent methods or powers; by condemnation under Article III of the Original Compact or by permissive occupation under Section (d) of Article X of the Supplemental Compact.

Under the right of eminent domain, the Commission could acquire title by fee simple or any other easement or right.

The word "occupy", as used in Section (d) of Article X of the supplement, is ordinarily considered to give the right to possession.

> *Missionary Society v. Dalles,* 107 U. S. 336 (1882):
>
> "* * * To occupy means to hold in possession; to hold or keep for use; as to occupy an apartment. Webster's Dictionary. * * *" (343)

The intention that subsection (d) shall not take away the power of eminent domain contained in Article III of the Original Compact is clearly shown by these other provisions of the supplement:

(1) Section (f) of Article X which provides:

> "The commission may acquire for the purposes of this article any real property which it shall find necessary or convenient to acquire for public use in the manner provided by Article III of this Agreement, or in the alternative in the Commonwealth of Pennsylvania in the same manner and with the same right of entry as the Highway Department of the Commonwealth may acquire lands by condemnation for highway purposes * * *"

This section authorizes the Commission to condemn "any real property", and would include the streets or other property of a municipality.

(2) Section 4, which has just been quoted *supra.*

(c) THE PROVISION IN SECTION (d) OF ARTICLE X OF THE SUPPLEMENTAL COMPACT THAT THE COMMISSION MAY OCCUPY STREETS, SUBJECT TO THE CONSENT OF THE GOVERNING BODY OF THE MUNICIPALITY, IS A LIMITATION ONLY UPON THE GRANT CONTAINED IN THE COMPACT OF POWER TO CONDEMN PROPERTY, AND IS NOT A RESTRICTION ON THE POWER OF THE LEGISLATURE OF PENNSYLVANIA OR ON THE POWER TO CONDEMN CONTAINED IN ACT NO. 35.

Even if it be conceded, for the sake of argument, that Section (d) of Article X could be construed as imposing a condition that the Commission obtain the consent of the municipality before condemning its property, such condition would attach only to the grant of the power of eminent domain in the compact itself. It would not qualify or restrict the authority to condemn which was later granted to the Commission by the Legislature of Pennsylvania in Act No. 35.

The grant of eminent domain contained in the compact was part of the sovereign power of the State of Pennsylvania to appropriate lands in Pennsylvania and of New Jersey to appropriate in that state. This grant of eminent domain was complete when the compact was enacted by the Legislatures of the two states and the later execution of the compact. Each state made this grant of eminent domain by virtue of its own sovereign power. Congress, by approving the compact, made no grant of eminent domain whatever. The compact and the grant of eminent domain were completed before the compact was submitted to Congress for approval. The approval by Congress was not in any degree a restriction on the power of eminent domain which the two states retained after the execution of the compact.

By the compact each state agreed that its power of eminent domain might be employed within its respec-

tive territory, to acquire land necessary for the project and neither state could revoke or withdraw this power or defeat the project agreed upon, so long as the compact should remain in force.

Each state, however, under its reserved powers, could still exercise its right of eminent domain to acquire property and give it to the Commission, if it wished to do so; or each state could confer upon the Commission the power of eminent domain in order that the Commission itself might condemn such necessary property. Such grant of authority to the Commission would be of an additional and ancillary power, and would not be subject to any conditions not contained in the Act of Assembly granting this additional power.

If we suppose that the Original Compact between the two states contained no grant of the power of eminent domain whatever, there can be no doubt, we submit, that either or both states could confer such a power of eminent domain upon the Commission in order to enable it to acquire property within the limits of a particular state.

The bridges involved in the compact were interstate bridges and, therefore, the two states had to act jointly, and each conferred upon the Commission power to condemn property within its territory. This grant by the two states in the compact did not, however, preclude a supplemental grant of the power of eminent domain to the Commission whenever occasion made it necessary or desirable. The state could grant such a power to the Commission just as it would make a similar grant to a private corporation organized to erect a bridge.

The Commission owes its corporate existence and its power of eminent domain to the states, and not to the national government.

(d) THE POWER TO REGULATE THE OWNERSHIP OF PROPERTY, PUBLIC OR PRIVATE, WITHIN ITS LIMITS, IS ONE OF THE RESERVED RIGHTS OF THE STATE UNDER AMENDMENT X OF THE FEDERAL CONSTITUTION. NEITHER CONGRESS NOR ANY OTHER DEPARTMENT OF THE FEDERAL GOVERNMENT INTENDED TO INTERFERE WITH THE EXERCISE BY THE STATE OF THIS AUTHORITY.

The State has clear authority to determine the powers which governmental agencies shall exercise and by what governmental agencies public property shall be acquired, owned and administered.

In *Highland Farms Dairy v. Agnew*, 300 U. S. 608 (1937), Mr. Justice Cardozo said:

> "* * * How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. * * *" (612)

The Commonwealth of Pennsylvania has the power to dispose, as it wishes, of property, including streets, owned by a municipal corporation in its governmental capacity, and to overrule any action of such municipal corporation and even to abolish it entirely.

In *Hunter v. Pittsburgh*, 207 U. S. 161 (1907), a notable case arose in connection with the consolidation of the former cities of Allegheny and Pittsburgh into the present city of Pittsburgh. The consolidation act provided that the property of every kind vested in the former cities should belong to the new consolidated city. In the opinion Mr. Justice Moody said:

"* * * Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers, **may take without compensation such property, hold it itself, or vest it in other agencies,** expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. * * *" (178-179) (Emphasis ours)

The Commission also is an agency for the exercise of governmental powers entrusted to it by the states. The only difference is that two states are acting jointly.

In *Mount Pleasant v. Beckwith,* 100 U. S. 514 (1879), this Court said that the Legislature of the state had authority to create municipal corporations and to:

"* * * **overrule their legislative action** whenever it is deemed unwise, impolitic, or unjust, and

even abolish them altogether, * * *" (529) (Emphasis ours)

(c) THE CONSENT OF THE STATE OF NEW JERSEY TO THE ENACTMENT OF ACT NO. 35 BY THE LEGISLATURE OF PENNSYLVANIA WAS OBVIOUSLY NOT NECESSARY, BECAUSE—

(1) The State of New Jersey, by signing the Original Compact, agreed in Article III that the Commission might secure the consent of the Commonwealth of Pennsylvania to the Commission's taking of property of a municipality by eminent domain.

(2) No right of the State of New Jersey, or any of its inhabitants, is affected by the provision in Act No. 35 that the Commission may condemn property of a municipality in Pennsylvania.

(3) None of the plaintiffs nor any owner of property to be condemned owns any property in New Jersey or has any right or standing to object that the State of New Jersey has not consented to Act No. 35, even if the State of New Jersey did have such a right to object.

The Attorney General of New Jersey appeared at the Bar of the Supreme Court of Pennsylvania, at the oral argument of this cause, and on behalf of the State of New Jersey joined the Attorney General of Pennsylvania in upholding the validity of Act No. 35. This action was officially noted in the opinion of Mr. Justice Jones for the Supreme Court of Pennsylvania, as follows:

> "Incidentally, while New Jersey is understandably not a party to the record in the instant proceeding, the Attorney General of that State appeared at bar upon the oral argument of this case

and expressly associated himself with all that the Attorney General of Pennsylvania had said in support of the Commonwealth's action (including Act No. 35) designed to carry out the terms and intendment of the compacts."

This court has held that an interstate compact is not impaired by legislation of one state, within its reserved powers, if such legislation does not affect the rights or interests of the other state or of its inhabitants under the compact.

Olin v. Kitzmiller, 268 Fed. 348 (1920).

The States of Oregon and Washington entered into a compact, which was ratified by Congress and provided as follows:

> "'All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, over which the states of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said states which would affect said concurrent jurisdiction, shall be made, changed, altered and amended, in whole or in part, only with the mutual consent and approbation of both states.'" (348)

At the time when the compact was made, the laws of both states authorized the issuance of licenses to take salmon to resident aliens who declared their intention to become citizens of the United States.

The Circuit Court of Appeals for the Ninth Circuit held that an Oregon statute which provided that no

license to catch salmon or other fish should be issued to any person who was not a citizen of the United States, did not violate this clause of the compact.

Circuit Judge Gilbert said:

"* * * From the language used it is clear that the contracting parties did not intend to divest either state of all power to enact without the other's consent legislation over the subject which was embraced therein. They left the Legislature of each state free to enact any law on the subject of the regulation and protection of fishing which would not affect the jurisdiction of the other state in the waters over which their jurisdiction was concurrent. A law which prescribes the qualification of a licensee by either state is clearly not a law which affects the concurrent jurisdiction. A law of Oregon which declares that such a license shall issue in that state only to residents and citizens thereof cannot come in conflict with a law or regulation of Washington, under which a license may there be issued to a resident alien who has declared his intention to become a citizen, nor can it, in any conceivable way, affect the rights of citizens or residents of the latter state.

"Each state has the power to deal with the question of the right of its own subjects to take fish in the waters which are subject to the concurrent jurisdiction. It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact. Many conceivable regulations would be within the prohibition of the compact. Thus one state, without the consent of the other, may not change the open

and closed seasons, may not prescribe the manner of taking fish, the number permitted to be taken, or the permissible fishing gear and appliances. All such matters affect the concurrent jurisdiction. It is not so with the designations of the qualifications of the licensees of either state to fish in the waters to which the concurrent jurisdiction extends." (349)

This decision was affirmed by the Supreme Court of the United States in

Olin v. Kitzmiller, 259 U. S. 260 (1922).

Mr. Justice McReynolds said:

"Considering the object and nature of the compact and the two acts of 1915, we cannot conclude that the parties intended by the identical provision to obligate themselves to issue any fishing license; the purpose was to limit the classes of persons who might have them,—beyond which the state might not go. There is no inhibition against narrowing these classes, nor, indeed, against a refusal to issue any license. The Oregon legislature acted in harmony with the compact when it excluded aliens; there was no impairment, and the judgment of the court below must be affirmed." (263)

P. J. McGowan & Sons, Inc. v. Van Winkle, 21 F. (2d) 76 (1927).

The State of Oregon also enacted a statute which prohibited anyone from employing a fish wheel or seine in order to take fish from the waters embraced within the compact quoted in the preceding case. District Judge Bean held that this statute likewise did not violate the compact, saying:

"* * * The object of the compact was to deal with the preservation and protection of fish in the waters over which the two states have concurrent jurisdiction, and to that end it provided that all laws and regulations necessary therefor, which would affect such concurrent jurisdiction, shall be made, changed, altered, or amended only with the consent of both states.

"We cannot conclude, however, that the parties thereto intended by the provisions of the compact to divest themselves of the power to legislate upon the subject embraced therein, so long as they do not undertake to permit the taking of fish at a time, in a manner, by means of appliances not permissible at the time the compact was made. In other words, the compact is a limitation beyond which the states may not go, but it is not an inhibition against the narrowing by either state of the class of persons who may be permitted by it to take fish or the appliances they may use. * * *" (77)

This decision was affirmed by the Supreme Court of the United States in 277 U. S. 574 (1928), in a memorandum opinion, as follows:

"* * * Affirmed, on the authority of Olin v. Kitzmiller, 259 U. S. 260, 263. * * *"

In each case the other state had not consented to or approved the later statute of Oregon, but this court held that the compact was not impaired.

The action of the State of Oregon in prohibiting aliens from fishing and in prohibiting the use of seines, did not in any manner affect the interests or rights of

the State of Washington. In like manner the action of the Pennsylvania Legislature in permitting the Commission to condemn property in a municipality in *Pennsylvania* could not have any conceivable effect upon the rights or interests of the State of New Jersey, or its inhabitants. No legal or practical reason, therefore, exists for requiring that the State of New Jersey or the Congress of the United States give their assent in any form to Act No. 35 adopted by the General Assembly of Pennsylvania.

PETITIONERS' SECOND QUESTION—

> "2. Was the 'consent' embodied in the resolution enacted by the City Council of the City of Easton on July 27, 1948, purporting to permit the Commission to occupy city streets for a bridge approach sufficient authority, without compliance with Sections 1057, 1058, and 1059 of the (Pennsylvania) Third Class City Law, Act of June 23, 1931, P. L. 932, 53 P. S. 12198—1057, 1058, and 1059 which requires an ordinance and provides for a referendum upon such ordinance?"

This question is really made up of two separate questions, each of which involves solely the interpretation of Pennsylvania statutes which were construed finally by the highest court of Pennsylvania in this case.

See—

Henderson v. Delaware River Joint Toll Bridge Commission, 362 Pa. 475 (June 24, 1949).

No Federal question is therefore presented.

The opinion of Mr. Justice Jones for the Supreme Court of Pennsylvania considered these questions as follows:

> "The plaintiff poses, as the questions involved, the following: (1) Was the consent of the City of Easton to the Commission's occupation of its streets for bridge-approach purposes sufficiently given by the resolution passed by the City council and was it not required to be given by ordinance on which a referendum to the electorate would lie? (2) The Borough of Morrisville having refused its consent to the Commission's occupation of its streets for bridge-approach purposes, can the Commission, within the authority of the compacts, overpass said streets, the use whereof as highways will be unaffected thereby? * * * (483-484)
>
> "* * * We need not, therefore, consider or discuss the remaining questions raised by the plaintiffs in their original briefs as to the sufficiency of the consent formally given by the City of Easton's 'governing body' (i.e., Council) to the Commission's use and occupation of certain streets of that City for an approach to the Easton-Phillipsburg Bridge and as to the right of the Commission, under the compacts, to overpass certain streets of the Borough of Morrisville, without interfering with the public use of such streets, for the construction and maintenance of the necessary approach to the proposed Morrisville-Trenton Bridge at its Pennsylvania end. It is sufficient to say in conclusion that we find no merit in those contentions." (490-491)

We add, however, that the phrase "governing body" of a city has been uniformly held to mean the city council and not the electors voting by referendum or otherwise.

See—

Fitzgerald v. Mayor, Etc., of Jersey City, 69 N. J. L. 152, 53 Atl. 819, 821 (1902), (citing I Dillon on Municipal Corporation, 5th Ed. Sec. 59);

Riedman v. Brison, 217 Cal. 383, 18 Pac. (2d) 947 (1933);

State v. Etheridge, Texas App. 32 S. W. (2d) 828 (1930).

The statutory referendum in cities of the third class does not make the people or the electors the governing body. The voters elect the governing body.

Under Article X (d) of the supplemental compact "the consent of the governing body of such municipality" means the consent of the city council, not the vote of the electors.

In *Hawke v. Smith,* 253 U. S. 221 (1920), this court held that the prohibition amendment was properly ratified by the "legislature" of Ohio although the Ohio Constitution expressly provided for a referendum to ratify a proposed amendment to the Constitution of the United States.

Mr. Justice Day said:

"* * * A Legislature was then the representative body which made the laws of the people. * * * (227)

* * * * * * *

> "The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—**ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word.** It is but the expression of the assent of the State to a proposed amendment. (229) (Emphasis added)

In petitioner's Statement of the Case, it is stated that "the City Council of Easton, has passed a resolution consenting to vacate the streets necessary for such approach upon the presentation to it of detailed engineering plans, * * *."

The grant of consent to occupy any street was not conditioned "upon the presentation of detailed engineering plans". The phrase "upon the presentation of specific detailed plans," occurs only in the "further" resolution that the city will vacate so much of the streets as will be necessary.

The Commission may occupy streets without their being vacated.

The form of resolution after reciting the plan for the approach and the necessity therefor, provides:

" 'Now, be it resolved, by the Council of the City of Easton, Pennsylvania, that the consent of the Council is hereby granted to the Delaware River Joint Toll Bridge Commission to enter upon, use, occupy, enlarge, construct and improve any street, alley, road, or highway within the limits of the City of Easton in connection with the construction, maintenance and operation of the proposed four-lane highway approach to be located generally parallel to and generally north of Bushkill Street, in the City of Easton, and extending approximately from the intersection of Bushkill Street and Pearl Street to the portal of the present Bushkill Street toll bridge, together with all appurtenances thereto, including the laying out and construction of a street generally parallel and to the north of the four-lane highway approach, for the convenience of owners and occupiers of land in the vicinity, pedestrians, vehicular traffic and in the public generally; and

" 'Resolved, further, That upon the presentation by the Delaware River Joint Toll Bridge Commission of specific detailed plans for the construction of the aforesaid project, the City of Easton will adopt appropriate legislation covering the vacating of so much of the streets located within the area of the project as will be necessary for the construction of the same.' " (Emphasis added)

The plan of the Commission did not contemplate or require that any streets be vacated. Vacation would follow only if the City authorities deemed it advisable.

PETITIONERS' THIRD QUESTION—

"3. Whether Act No. 35 of the General Assembly of the Commonwealth of Pennsylvania, the Act of March 31, 1949, 34 P. S. 3411 – 3415, was operative to supersede the requirements of Article X, Section (d) of the compact, as amended, (Act of the General Assembly of Pennsylvania, Act of June 13, 1947, P. L. 952, No. 256, § 1, 34 P. S. 3401; N. J. L. 1947, c. 283, p. 989, N. J. S. A. 32:8-10, 32:8-11) and as ratified by the Congress of the United States (Act of Aug. 4, 1947, c. 481, 61 Stat. 756), requiring the consent of the governing body of the municipality for the occupation of its streets, without the consent of the State of New Jersey and the ratification of the Congress of the United States?"

In reply we point out—

(1) Consent of the City of Easton was given by a resolution of the City Council. The Supreme Court of Pennsylvania in this case interpreted the applicable Pennsylvania statutes and held (*supra* p. 17) that such consent was sufficient without a referendum to the voters.

(2) The Supreme Court of Pennsylvania in this case interpreted the Pennsylvania statutes and held (*supra* pp. 17-18) that the Commission had the right to overpass streets of the Borough of Morrisville without securing its consent.

The opinion decides that petitioners' contention that

"* * * the Commission is not authorized to build the proposed overpasses crossing the streets of the Borough of Morrisville without the consent

of the council of that Borough. * * *" (362 Pa. at page 482)

was without merit.

No Federal question is therefore presented.

We will, however, reply to petitioners' contention that Pennsylvania Act No. 35 is an attempt to modify or supersede Section (4) of Article X of the Supplemental Compact and is invalid unless consented to by the State of New Jersey and ratified by the Congress.

(1) As already argued (*supra* p. 12), no right of the State of New Jersey or of its inhabitants is affected by Act No. 35; and further none of the petitioners owns property in New Jersey or has any right to object that that state has not consented to Act No. 35.

(2) As already argued (*supra* p. 12) the State of New Jersey agreed in Article III of the original compact that the Commission might secure the consent of the Commonwealth of Pennsylvania to its taking property of a municipality by eminent domain. Congress gave its consent to this provision in Article III when it approved the original compact.

(3) As already argued (*supra* pp. 8-11), the Commonwealth of Pennsylvania, under its reserved powers, had authority to confer upon the Commission additional and ancillary power to condemn property in aid of carrying out the purposes for which the Commission was created.

(4) Even though the original compact did not provide that the commission might be expressly authorized by the Commonwealth of Pennsylvania to condemn streets, the enactment of Act No. 35 would not be an impairment of the compact.

When Congress consents to a compact between states, it does not enter into the compact as one of the contracting parties thereto, or make any covenants or assume any obligations or surrender any of its rights or powers. No provision in the Federal Constitution authorizes Congress to make itself a party or the United States a party to a compact between states, with any effect similar to that when a Senate ratifies a treaty between the United States and a foreign nation.

The compact must be fully negotiated and executed by the states before it is submitted to Congress for approval.

Congress then merely approves or disapproves. In the instant case it did not itself legislate any requirement of municipal consent to the occupation of a street. The provision in the compact that no property of a municipality be occupied by the Commission without consent of such municipality was a restriction imposed only upon the grant of eminent domain by the compact itself. The compact did not impose such a condition upon the exercise of the sovereign power of eminent domain still possessed by the States of Pennsylvania and New Jersey.

The power of Congress in passing upon a compact is analogous to a veto power.

See *Frankfurter and Landis, The Compact Clause of the Constiution,* 34 Yale Law Journal, page 719.

By approving a compact, neither Congress nor the United States undertakes that every stipulation thereof shall be performed or that every right created thereby shall be protected or enforced.

In giving consent to the compact, Congress is not contracting, it is legislating.

The principle of law, therefore, that a term or provision of a contract may not be modified without the consent of the parties thereto, would not apply or require that Congress consent to every change in detail which might be of interest to a particular state, but would have no bearing upon the relation of Congress to the compact.

(5) Act No. 35 is actually in aid of the Commission in further enabling it to carry out the purposes of the compact. All that Act No. 35 does is to give the Commission additional and ancillary authority to appropriate the property of a municipal authority without obtaining its consent and this is done in the fulfillment of the present power which Article III of the original compact provided that the Commonwealth might confer upon the commission.

(6) It is true, of course, that in recent years Congress has required either its approval or the approval of the Secretary of War to the erection of a bridge or any other obstruction in any navigable stream of water. Congress applies this requirement to every bridge whether it be interstate or intrastate. Its purpose is to prevent obstructions to navigation and this action is taken under the power to regulate interstate commerce and not under the Compact Clause.

By the Acts of March 3, 1899, 30 Stat. 1151, 33 U.S.C.A. Section 401, and March 23, 1906, 34 Stat. 84, 33 U.S.C.A. Section 491, Congress provided that no bridge might be constructed across a navigable river until the plans for the same had been approved by the Chief of Engineers and the Secretary of War.

(7) A review of the decisions of this court under the Compact Clause will show that the clause applies only to such agreements as tend to increase the political power of the states and to encroach upon or interfere with the supremacy of the United States.

See—

Virginia v. Tennessee, 148 U. S. 503, 517, 519 (1893);
Wharton v. Wise, 153 U. S. 155, 167 (1894);
Stearns v. Minnesota, 179 U. S. 223, 246 (1900);
Kentucky Union Company v. Kentucky, 219 U. S. 140, 164-165 (1911).

(8) *Delaware River Joint Toll Bridge Commission v. Colburn,* 310 U. S. 419 (1940), held that the construction of a compact between states, which had received the consent of Congress, involved a Federal question within the meaning of the Federal judicial code, and therefore the Supreme Court had jurisdiction to review this question.

It is significant that Mr. Justice Stone says that in the above case the Supreme Court is reviewing the decision because it involved a Federal title, right, privilege or immunity, not because it involved a statute of the United States. The above decision, therefore, does not establish, that the consent of Congress made the compact in this case a law of the United States.

(9) In conclusion, we submit, a state which is a party to any such compact has the right to pass legislation in aid of the effectuation of the purposes of the compact so long as it does not impair the rights of any state which is a party to the compact or encroach upon the sovereignty of the Federal government.

PETITIONERS' REASONS FOR ALLOWANCE OF CERTIORARI.

The petition submits six reasons, which will be considered in order.

FIRST REASON.

> "1. This is the first case to reach this Court wherein the validity of the action of one state in unilaterally changing the terms of an interstate compact, which has been ratified by the Congress of the United States, has been challenged. The matter at issue is of much importance since the determination of the issues arising herein enters into and affects the rights of all states which have entered into interstate compacts."

We respectfully submit that this application is not the first case to reach this court upon the questions stated.

In *Kentucky Union Company v. Kentucky,* 219 U. S. 140 (1911), this court held that a provision in the Virginia Compact of 1879 that all private rights and interests of land acquired under the laws of Virginia prior to the separation, should remain valid and be determined by the laws then existing in Virginia, did not prevent the State of Kentucky from enacting legislation requiring the registration of land titles for taxation and forfeiting such titles to the state in default of such registration.

In *Olin v. Kitzmiller,* 259 U. S. 260 (*supra,* p. 13), and *P. J. McGowan & Sons, Inc. v. VanWinkle,* 277 U. S. 574 (*supra,* p. 15), this court considered acts of the Legislature of a state and held that they did not amount to an impairment of a compact.

SECOND REASON.

The legislature of New Jersey did not refuse to pass concurrent legislation to the Pennsylvania Act of March 31, 1949, known as Act No. 35. The statement of petitioner that bill was permitted "to die in the Majority Caucus of the General Assembly", indicates that the Legislature did not vote for or against the bill.

As already shown (*supra*, p. 12), Act No. 35 related only to lands in Pennsylvania and there was no necessity that the Legislature of New Jersey pass a companion bill.

THIRD REASON.

The compact sanctioned by Congress clearly provided that the Commission might be expressly authorized by either state to take property of a municipality without its consent (*supra* p. 2), and such consent was given by Act No. 35.

FOURTH REASON.

As stated in our comment in the third reason, the original compact contemplated and stipulated that express authority to take property of a municipality without its consent might be conferred by either state. Act No. 35 therefore was entirely consistent with the compact and did not repeal or abolish any portion thereof.

FIFTH REASON.

The assertions of petitioners that a proposal to build a new approach to the Easton bridge and a new toll bridge at Morrisville "would cause great suffering and hardship to the citizens", and "would displace 800 persons during a critical housing shortage, and make countless other homes uninhabitable", are not supported by any averment or proof in the record and are not

properly brought before this court. Respondent has had no opportunity to deny or disprove such averments.

The City of Easton now has a free bridge within two blocks of the bridge in question. The City of Trenton has two free bridges which provide the means of crossing the Delaware River at Morrisville, Pennsylvania.

The inclusion of the several bridges (such as the Easton Bridge and the Morrisville Bridge) in a "single project" was sanctioned by the Act of Congress of August 4, 1947, and by the later Act of Congress of June 30, 1948.

The Act of Congress of August 30, 1935 (49 Stat. 1051), which gave consent to the Original Compact, provided in subsection (d) of Section 2 that tolls might be charged to amortize the cost of the bridge and its approaches.

The Act of August 4, 1947, 61 Stat. 752, which gave consent to the supplemental compact, provided:

> "* * * That after the costs of the bridges in a single project have been amortized, such bridges shall thereafter be maintained and operated free of tolls."

The Act of June 30, 1948, amending Section 2 of the Act of August 30, 1935, provided:

> "'(e) Notwithstanding any of the foregoing provisions of this section or of any other Act of Congress, the Delaware River Joint Toll Bridge Commission of the Commonwealth of Pennsylvania and the State of New Jersey is hereby authorized (1) to fix and charge tolls for transit over any bridge heretofore or hereafter constructed by it across the Delaware River in accordance with the

provisions of the original compact or agreement between said Commonwealth of Pennsylvania and said State of New Jersey which is set forth in section 9 of said Act approved August 30, 1935, as amended with the consent of Congress by the compact or supplemental agreement which is set forth in the Act approved August 4, 1947; and (2) to unite or group any such bridge into a single project for financing purposes and to continue to fix and adjust the tolls for the use of the bridges in such project and pledge such tolls in accordance with the provisions of said original compact or agreement as so amended: Provided, however, That after the cost of any such bridge or of the bridges in any such project shall be amortized, such bridge or bridges shall thereafter be maintained and operated free of tolls.' " (Emphasis ours)

This last act, we submit, clearly authorizes the Commission to include the approach to the Easton Bridge and the Morrisville Bridge in a single project and in a single bond issue and to collect tolls from the same in a single project and to collect tolls from both bridges until such bonds are retired.

In addition, Congress in giving consent to the "Supplemental Compact", approved section (h) of Article X, which section provided:

"(h) The commission may provide from time to time for the issuance of its bridge revenue bonds for any one or more of the following purposes, (1) providing funds for the acquisition, construction, rehabilitation or improvement of any one or more bridges, the acquisition, construction, rehabilitation or improvement of which is herein authorized, (2)

providing funds for the construction or improvement of approach facilities deemed by the commission to be necessary or desirable in connection with the acquisition, construction, maintenance or operation, of any bridge owned or operated by the commission, including but without limitation, bridge approaches, entrance plazas, overpasses, underpasses, and approach highways, and (3) **refunding any bridge revenue bonds or bridge revenue refunding bonds of the commission. The bridge or bridges (including any approach facilities) on account of which a single issue of bonds shall be issued, as herein authorized, shall constitute a single project for financing purposes."**

Respectfully submitted,

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APPENDIX.

Statutes Involved.

ORIGINAL COMPACT.

Article III of the original compact between the Commonwealth of Pennsylvania and the State of New Jersey, (Pennsylvania Act of June 25, 1931, P. L. 1352; May 18, 1933, P. L. 827, 36 P. S. Section 3401; New Jersey Act of June 11, 1934, N. J. S. A. 32:8-1 to 32:8-15 and ratified by the Congress of the United States (Act of August 30, 1935, c. 833, Sec. 9, 49 Stat. 1058) provided in part as follows:

> "If for any of its authorized purposes (including temporary purposes), the commission shall find it necessary or convenient to acquire for public use any real property in the Commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest, and the said determination shall not be affected by the fact that such property has theretofore been taken for or is then devoted to a public use, but the public use in the hands or under the control of the commission shall be deemed superior to the public use in the hands or under the control of any other person, association, or corporation.
>
> * * * * * * *
>
> "However, anything to the contrary contained in this compact notwithstanding, no property, now or hereafter vested in or held by any county, city, borough, village, township or other municipality, shall be taken by the commission without the con-

sent of such municipality, unless expressly authorized so to do by the Commonwealth or State in which such municipality is located. * * *

* * * * * * *

"The term 'real property' as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

The original compact was amended (Pennsylvania Act of June 13, 1947, P. L. 592, No. 256, 34 P. S. Section 3401; New Jersey N. J. L. 1947, c. 283, p. 989, N. J. S. A. 32:8-10, 32:8-11) and as ratified by the Congress of the United States (Act of August 4, 1947, c. 481, 61 Stat. 756), so as to add the following provisions:

"ARTICLE X.

* * * * * * *

"(d) The commission may enter upon, use, occupy, enlarge, construct and improve, any street, road or highway, located within the limits of any municipality, and deemed by the commission to be necessary in connection with the acquisition, construction, improvement, maintenance or operation, of any bridge, owned or operated by the commission, or of any bridge approaches, bridge plazas, or approach highways to any such bridge, subject how-

ever to the consent of the governing body of such municipality, and to such reasonable police regulations as may be established by such governing body.

* * * * * * *

"(f) The commission may acquire for the purposes of this article any real property which it shall find necessary or convenient to acquire for public use in the manner provided by Article III of this Agreement, or in the alternative in the Commonwealth of Pennsylvania in the same manner and with the same right of entry as the Highway Department of the Commonwealth may acquire lands by condemnation for highway purposes, * * *

* * * * * * *

"(h) The commission may provide from time to time for the issuance of its bridge revenue bonds for any one or more of the following purposes, (1) providing funds for the acquisition, construction, rehabilitation or improvement of any one or more bridges, the acquisition, construction, rehabilitation or improvement of which is herein authorized, (2) providing funds for the construction or improvement of approach facilities deemed by the commission to be necessary or desirable in connection with the acquisition, construction, maintenance or operation, of any bridge owned or operated by the commission, including but without limitation, bridge approaches, entrance plazas, overpasses, underpasses and approach highways, and (3) refunding any bridge revenue bonds or bridge revenue refunding bonds of the commission. The bridge or bridges (including any approach facilities) on account of which a single issue of bonds shall be

issued, as herein authorized, shall constitute a single project for financing purposes."

Section 4 of the amending act further provided:

"Section 4. Nothing contained in this act, nor in the supplemental compact or agreement authorized by this act, shall be deemed to supersede, abrogate or repeal in any way, any powers heretofore granted to the commission. This act, and said supplemental compact or agreement, shall be regarded as conferring supplemental and additional powers to the commission, and shall not be regarded as being in derogation of any powers now existing."

PENNSYLVANIA ACT NO. 35, APPROVED MARCH 31, 1949, (PURDON'S PENNSYLVANIA LEGISLATIVE SERVICE FOR SESSION OF 1949, p. 428.

"Section 1. For the effectuation of its authorized purposes, the Delaware River Joint Toll Bridge Commission, a body corporate and politic (hereinafter referred to as the 'Commission'), is hereby granted power and authority to enter upon, use, overpass, occupy, enlarge, construct, improve, or close any easement, street, road or highway, located within the limits of any municipality in Pennsylvania, or to use, occupy or take property, now or hereafter vested in or held by any municipality in Pennsylvania.

"Section 2. * * * It shall not be necessary for the Commission to obtain the consent of the municipality or the governing body thereof for the exercise of any of the powers conferred by this act, any law or compact to the contrary notwithstanding.

"Section 3. If, under the Constitution and laws of the Commonwealth of Pennsylvania, any damages are payable to any municipality by reason of the exercise of the powers conferred by this act, such damages shall be paid by the Commission and shall be ascertained and determined in the same manner as provided for in the act, approved the twenty-fifth day of June, one thousand nine hundred thirty-one (Pamphlet Laws 1352), entitled 'An act providing for joint action by the Commonwealth of Pennsylvania and the State of New Jersey in the administration, operation, and maintenance of bridges over the Delaware River, * * *

"Section 4. Whenever necessary, because of the exercise of any of the powers herein conferred, to remove, alter, change or relocate any facilities owned by a municipality or any municipal agency of a municipality located above or below the surface of the street, road or highway, or property vested in, or held by, the municipality, the Commission shall pay the costs or expenses involved in connection with such removal, alteration change or relocation. All streets, roads or highways, or parts thereof, designated and used by the Commission as a part of any approach, bridge plaza or approach highway, shall be maintained and kept in repair by the Commission.

"Section 5. The powers vested in the Commission by this act shall be construed as being in addition to and not in diminution of the powers heretofore or hereafter vested in the Commission by law."

ACT OF CONGRESS OF JUNE 30, 1948, C. 772, UNITED STATES CODE CONGRESSIONAL SERVICE, VOLUME 1, P. 871.

"Section 2 of the Act entitled 'An Act to authorize the construction of certain bridges and to extend the times for commencing and/or completing the construction of other bridges over the navigable waters of the United States, and for other puropses', approved August 30, 1935, be, and the same is hereby, amended and supplemented by adding at the end thereof the following paragraph:

"'(e) Notwithstanding any of the foregoing provisions of this section or of any other Act of the Congress, the Delaware River Joint Toll Bridge Commission of the Commonwealth of Pennsylvania and the State of New Jersey is hereby authorized (1) to fix and charge tolls for transit over any bridge heretofore or hereafter constructed by it across the Delaware River in accordance with the provisions of the original compact or agreement between said Commonwealth of Pennsylvania and said State of New Jersey which is set forth in section 9 of said Act approved August 30, 1935, as amended with the consent of Congress by the compact or supplemental agreement which is set forth in the Act approved August 4, 1947; and (2) to unite or group any such bridges into a single project for financing purposes and to continue to fix and adjust the tolls for the use of the bridges in such project and pledge such tolls in accordance with the provisions of said original compact or agreement as so amended: Provided, however, That after the cost of any such bridge or of the bridges in any such project shall be amortized, such bridge or bridges shall thereafter be maintained and operated free of tolls'."